

Ex 15₁

13 DEPOSITION OF JENNIFER S. MOECKEL,
14 taken at the offices of the Attorney General,
15 33 Capitol Street, Concord, New Hampshire,
16 on Friday, March 29, 2013, commencing
17 at 9:45 a.m.

1 terminate the person for making that complaint?

2 A. It would really depend. I would need more
3 information.

4 Q. Okay. I'm asking you to assume the person made
5 the complaint of sexual harassment in good faith?

6 A. Yes.

7 Q. An investigation was done?

8 A. Yes.

9 Q. And it was found that the complaint was not
10 substantiated. My question to you is would it be
11 appropriate to fire that person for making that
12 complaint?

13 A. With those assumptions the answer to your question
14 is no.

15 Q. In what circumstances would it be appropriate to
16 terminate a person who made a complaint of sexual
17 harassment related to that complaint versus other
18 reasons?

19 MS. DEMPSEY: Objection as to form. You can
20 answer.

21 THE WITNESS: So if I assume that a
22 termination is going to be because of the
23 complaint and not because of other factors?

1 MS. DEMPSEY: Okay.

2 THE WITNESS: If I'm understanding your
3 question correctly, I have seen investigations
4 where initially there's one alleged wrongdoer and
5 then in the course of the investigation other
6 allegations surface regarding other people who may
7 be witnesses in the investigation; and yes, I have
8 seen at times termination result against those
9 witnesses as well.

10 Q. (BY MS. JOHNSON) Does an employer have a duty to
11 investigate when an employee complains about
12 sexual harassment?

13 A. Yes. Provided that there's enough information for
14 the employer to determine that it really is sexual
15 harassment at issue. What I mean by that is
16 sometimes people use the term loosely and they're
17 not actually complaining about unwelcomed conduct
18 directed at them because of its sex, but it's used
19 more loosely. But if it's in the true sense that
20 generally there's a complaint that unwelcome
21 conduct has been directed at a person because of
22 their sex, then an employer would have an
23 obligation to investigate.

1 Q. And that would go for any type of discrimination,
2 correct?

3 A. Any type of discrimination on a legally protected
4 basis, yes.

5 Q. What about just plain harassment, not based on any
6 protective category, should an investigation be
7 done?

8 A. The answer to that question whether an
9 investigation should be done depends. There are
10 times when people complain in the workplace of
11 sort of generally being hassled or generally being
12 unhappy with the way they're being spoken to, that
13 type of thing, and I don't believe there to be a
14 duty to investigate in circumstances like that.
15 Though there may be times when an employer might
16 wish to do so for employee morale purposes or
17 other business reasons. So I think what's
18 catching me up is the word should. There are
19 times when this makes sense to do it and times
20 when it might not. It would depend on the
21 circumstances.

22 Q. Okay. What about if an employee complains about
23 being afraid of another worker in the workplace,

1 should there be an investigation done?

2 A. I would imagine that in many circumstances, if not
3 most, the answer would be yes. The reason I'm not
4 being more concrete is there might be some fact
5 that's not on the table for me to consider that
6 would make an allegation, you know, absurd or
7 investigation not appropriate or that type of
8 thing, but in general it should be investigated.

9 Q. Okay.

10 A. There are also times, to add to that answer, I
11 have been involved in occasions where an
12 investigation in the traditional sense was not
13 conducted because the information was just so
14 evident and the employer instead just moved to
15 disciplinary action or termination for safety
16 purposes that, you know, an investigation really
17 wasn't necessary.

18 Q. Okay. All right. I am going to show you what is
19 Judicial Branch Policy, or Personnel Rule 27, for
20 you to take a look at, which was formerly Brown
21 20.

22 (Moeckel Exhibit 4 marked for I.D.)

23 Q. (BY MS. JOHNSON) Have you seen that policy

1 totality, I mean it's based on the totality of --
2 strike that.

3 But there could be sufficient retaliation
4 among coworkers to rise to the level of a hostile
5 environment, correct?

6 A. It depends. From a legal point of view my
7 understanding -- this is sort of outside of the
8 scope of what I was asked to opine on, but my
9 understanding is that in order for a hostile
10 environment created by colleagues or coworkers to
11 rise to the level of retaliation, first of all the
12 conduct has to be directed at the person because
13 of the originally -- because of the original
14 legally protected activity. And secondly, it has
15 to be something that the employer knew or should
16 have known about. So there's a whole bunch of
17 legal requirements built in there.

18 Q. Okay. Is it fair to say that -- strike that. Was
19 it your understanding that Ms. Walker felt
20 physically threatened by Lisa Towle?

21 MS. DEMPSEY: I'm sorry, can you just repeat
22 the question?

23 Q. (BY MS. JOHNSON) Was it your understanding that

1 recall if she made a finding as to whether
2 Ms. Walker was actually afraid.

3 Q. If she had made a finding that Ms. Walker was
4 actually afraid of Ms. Towle, would it be
5 inappropriate for the employer to take any
6 disciplinary action against Ms. Walker under those
7 circumstances?

8 A. It would really depend.

9 Q. What would it depend on?

10 A. Well, it would depend on the reason for the
11 disciplinary action and the circumstances
12 surrounding that. And then it would also depend
13 in part, a person can have a subjective belief
14 that's not, you know, borne out by, you know, sort
15 of objective evidence and that type of thing. It
16 also would depend on, you know -- it would depend
17 on reasonableness. It would depend on -- the
18 motive that Ms. Walker would have in bringing a
19 complaint.

20 Q. With respect to what Ms. Hurley was investigating,
21 though, if she believed that Ms. Walker truly was
22 afraid of Ms. Towle but that Ms. Hurley just did
23 not credit it, in that circumstance it would be

1 inappropriate to go down -- inappropriate to begin
2 a disciplinary or termination process based on
3 that, correct?

4 MS. DEMPSEY: Objection as to form. You can
5 answer.

6 THE WITNESS: I would not recommend
7 terminating someone simply because they were
8 fearful of somebody else. At the same time, I
9 mean, you know, as you know in the practice of law
10 people consider things all the time or start
11 things that are not finished and that type of
12 thing, so your question was talking about
13 beginning something?

14 Q. (BY MS. JOHNSON) Well, taking disciplinary action
15 against someone who makes a good faith belief
16 report based on their belief?

17 A. Okay, so that's a different question. Because
18 before it was based on the fear. So if I assume
19 that there's a good faith report, and if I assume
20 that a person was disciplined or terminated for
21 making the good faith report, then I would agree
22 that disciplinary action or termination would not
23 be appropriate.